

Salcon Engineering Sdn Bhd v PRM Energy Systems (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S1-22-182-1993
ANUAR J
27 MAY 1993

Civil Procedure — Injunction — Application for Mareva injunction — Risk of dissipation of assets — Balance of convenience — Whether there was non-disclosure of material facts

The plaintiff by a summons-in-chambers applied for and obtained an ex parte Mareva injunction against the defendant. At the inter partes hearing, the main argument advanced by the defendant was that the plaintiff was guilty of non-disclosure of material facts and that the court ought to refuse to continue the injunction.

Held, allowing the application:

- (1) The question of non-disclosure of material facts is not relevant at the inter partes hearing. If there was non-disclosure, this would go towards the award of costs or render the plaintiff liable on its undertaking as to damages.
- (2) On the facts of the case, the plaintiff was not guilty of material non-disclosure when applying ex parte.
- (3) There was a real risk of dissipation of assets here: the defendant had no proven prior trading record in Malaysia nor did it have any proper business premises. Further, the only assets they had within the jurisdiction were liquid assets in their bank accounts which could readily be uplifted. The balance of convenience therefore was in favour of the plaintiff.

[Bahasa Malaysia summary]

Plaintif melalui suatu saman-dalam-kamar memohon dan memperolehi suatu injunksi Mareva ex parte terhadap defendan. Pada pembicaraan inter partes, hujah utama yang dikemukakan oleh defendan adalah bahawa plaintif bersalah kerana tidak mendedahkan fakta-fakta material dan bahawa mahkamah sepatutnya menolak untuk meneruskan injunksi itu.

Diputuskan, membenarkan permohonan itu:

- (1) Persoalan ketakdedahan fakta-fakta yang material adalah tidak relevan pada pembicaraan inter partes. Jika terdapat ketakdedahan, ini akan membawa kesan kepada award kos ataupun mengakibatkan plaintif bertanggungjawab atas akujanjinya mengenai ganti rugi.
- (2) Berdasarkan fakta-fakta kes ini, plaintif didapati tidak bersalah kerana ketakdedahan yang material apabila memohon ex parte.
- (3) Di sini terdapat suatu risiko tulen yang aset akan dilesapkan: defendan tidak mempunyai sebarang rekod perdagangan sebelum itu yang terbukti di Malaysia, dan juga tidak mempunyai sebarang

A premis perniagaan yang berpatutan. Tambahan lagi, aset di dalam bidang kuasa yang menjadi kepunyaan defendan adalah hanya aset cair dalam akaun bank mereka yang boleh dengan mudah dilesapkan. Imbangan kemudahan oleh demikian memihak kepada plaintif.]

B [Editorial Note: The defendant has appealed to the Supreme Court vide Civil Appeal No 02-338-93.]

Notes

For cases involving the Mareva injunction, see 2 *Mallal's Digest* (4th Ed) paras 1125-1135.

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Cases referred to

- 1 *Behbehani & Ors v Salem & Ors* [1989] 2 All ER 143; [1989] 1 WLR 723 (not folld)
- 2 *Ali Fahd Shobokshi Group Ltd v Moneim* [1989] 2 All ER 404; [1989] 1 WLR 710 (not folld)
- D 3 *Brink's-Mat Ltd v Elcombe & Ors* [1988] 3 All ER 188; [1988] 1 WLR 1350 (not folld)
- 4 *Bennett v The Excelsior Land, Investment and Building Co Ltd, and Bank* (1893) 14 LR (NSW) (Eq) 179 (refd)
- 5 *Broadbent & Ors v Marshall & Ors* (1863) 2 VLR 115 (refd)
- E 6 *Professor Dr A Kahar Bador & Ors v N Krishnan & Ors* [1983] 1 MLJ 407 (refd)

G Sri Ram (Albert Toong and David Morais with him) (*Albert Toong & Associates*) for the plaintiff/applicant.

Loh Stew Cheang (P Ganathan with him) (*Cheang & Ariff*) for the defendant/respondent.

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Anuar J: The plaintiff, by a summons-in-chambers dated 24 March 1993, applied for and obtained ex parte, an injunction in the form of a Mareva injunction against the defendant also on 24 March 1993. I made the summons returnable on 8 April 1993. The papers were duly served on the defendant, respective affidavits were filed and argument was heard in chambers over a number of days. After each hearing, the injunction was continued till the next hearing date and finally till the date of judgment.

The main argument advanced by the defendant was that the plaintiff was guilty of non-disclosure of material facts. It was urged on me that if the plaintiff was indeed guilty of wilful non-disclosure, then I ought to refuse to continue the injunction, without inquiring into other aspects of the case.

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Much of the defendant's argument was based on recent development in the law in England and in particular, was concentrated on the cases of *Behbehani & Ors v Salem & Ors*,¹ *Ali Fahd Shobokshi Group Ltd v Moneim*² and *Brink's-Mat Ltd v Elcombe & Ors*.³

I The position of the English Courts in these cases appear to place an extremely high burden of disclosure on the plaintiff applying for an injunction ex parte. Their position seems to be that unless all material facts are disclosed, whether their materiality was known at the time of applying for the injunction or not, any injunction granted ex parte would be discharged for want of disclosure.

Those cases also considered the question of regrant of subsequent injunctions if on full disclosure at the inter partes hearing, there was sufficient cause disclosed to warrant subsequent injunctions. According to those cases, fresh or second injunctions would only be considered after an assessment of the degree and extent of culpability with regard to non-disclosure and the significance to the outcome of the ex parte application of the matters which were not disclosed to the court. It is only after the 'culpability' and 'significance' thresholds are crossed will the court consider the merits of a fresh injunction.

The difficulty with the *Brink's-Mat* line of cases is that they seem to require that virtually every document and every issue between the parties be disclosed at the ex parte stage. This would be impractical both from the point of view of the applicant who obviously has to prepare his application on an urgent basis and impractical for the court which will have to spend considerable time going through all the documents in detail.

Further, those cases are based on policy grounds to prevent what must obviously be an abuse in the English system, the rationale being to penalize parties who fail in their duty to the court. While I agree that such parties should be penalized, the penalty should be reflected on the question of probity and bona fides and not as an absolute bar as those cases seem to indicate.

I am more inclined to follow the rationale in the cases of *Bennett v The Excelsior Land, Investment and Building Co Ltd*, and *Bank*⁴ and *Broadbent & Ors v Marshall & Ors*,⁵ in dealing with situations such as the present case, where a limited injunction is granted ex parte until the hearing inter partes. In *Bennett*⁴ and *Broadbent*,⁵ it was decided that the question of non-disclosure was not relevant at the inter partes hearing where both sides were obviously represented. If there was non-disclosure, this would go towards the award of costs. I would go further and say that material non-disclosure at the ex parte stage might additionally render the plaintiff liable on its undertaking as to damages.

This is a more sensible approach since the task of the court at the inter partes hearing is to consider on the basis of all the evidence before it, whether the injunction should be continued or not. I do not agree with the *Bennett* and *Broadbent* approach in so far as serious non-disclosure is concerned. In my judgment, where the non-disclosure is very serious so as to amount to a positive misleading of the court, then it becomes a matter which goes into the balance when considering the probity and bona fides of the applicant. In such circumstances, the court will look at the applicant with a high degree of circumspection.

The practicality of the *Bennett* and *Broadbent* approach is that the court will not, at the inter partes hearing, be encumbered with a forensic study on the question of disclosure. In some cases, such as the present, this is an onerous task involving detailed study of voluminous documents. At the end of this exercise, much time is wasted. I prefer to approach the inter partes hearing on a more pragmatic level by considering the merits of continuing the injunction on the material disclosed by both parties.

I have dealt with these issues at some length in deference to the argument urged on me by both parties. If, however, I am wrong on the law, it is my judgment that on the facts of this case, the plaintiff was not in any event, guilty of material non-disclosure when applying ex parte.

A I am mindful of the decision of Hashim Yeop A Sani J (as he then was) in *Professor Dr A Kahar Bador & Ors v N Krishnan & Ors*⁶ as to what amounts to a suppression of material facts.

B The main issue of non-disclosure put forward by the defendant is that the plaintiff has failed to disclose the 'conditions of contract'. The defendant says that if those conditions had been disclosed, the court would have come to the view that the imposition of liquidated and ascertained damages ('LAD') by the defendant on the plaintiff, was contractually provided for.

C I find that on re-reading the plaintiff's first affidavit (which was the affidavit on which I granted the ex parte injunction), that the issue of LAD has indeed been disclosed sufficiently. The plaintiff has disclosed that an issue exists as to the imposition of LAD and has sufficiently disclosed the existence of the dispute on this issue. Notwithstanding that the actual conditions of contract were not exhibited, the explanation as to the dispute is in my view sufficient disclosure. Indeed, on hearing both parties, it is clear that whether or not LAD was contractually provided for in the agreement between the parties is a matter which cannot be determined on affidavit evidence alone. It is in fact a serious question to be tried and I do not propose, nor am I required to, resolve that issue on affidavits alone at this stage.

E The other issues raised on the question of non-disclosure, such as the variation works, consultants' fees, whether certain invoices were due or not, progress claims and warranty are, in my judgment, matters which are not sufficiently material and in any event, are all matters which are in dispute. As with the issue of LAD, these too are matters which can only be determined at trial. The issue, therefore, of whether the moneys/damages claimed by the plaintiff are in fact owed is, in my judgment, a serious issue to be tried.

F Coming to the issue of the risk of dissipation of assets, I am far from satisfied with the explanations given by the defendant. Stripping the matter to its core, we are left with a situation where the defendant has no proven prior trading record in Malaysia nor has it shown with any degree of conviction that it has secured any future business. It owns no assets within the jurisdiction and does not even have proper business premises. Further, it has been demonstrated that the defendant is really the alter ego of a family business run by the Bailey family. That family is resident ordinarily in the United States. The only assets within the jurisdiction are liquid assets in their bank accounts which can readily be uplifted. The plaintiff's fear of the assets being dissipated are, in my judgment, real. The balance of convenience must be in favour of the plaintiff.

G In the circumstances, and in the exercise of my discretion, I am satisfied that all the necessary criteria for the grant of the injunction inter partes exist. I therefore grant an order in terms of encl 3 until the trial of this action. Bearing in mind that such an injunction may cause some hardship to the defendant, I hereby also order an early trial of this action. As soon as counsel have settled the directions and set this matter down for trial, they may seek an appointment with me to fix trial dates.

H The costs of this application shall be paid by the defendant to the plaintiff in any event.

I *Application allowed.*